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LIM PEAK SUAN SDN BHD & ORS

v.

SUNGEI BONGKOH ESTATE SDN BHD & ORS

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HIGH COURT MALAYA, ALOR STAR
MOHD SOFIAN ABD RAZAK J
[CIVIL SUIT NO: 22-72-2005]
28 DECEMBER 2008

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COMPANY LAW: *Derivative action - Striking out of - Exception to rule in Foss v. Harbottle - Locus standi - Fraud on the minority - Separate legal personality - Common intention - Quasi-partnership - Trust for beneficiaries of company - Breach of fiduciary duties - Justice of case - Whether claim clearly unsustainable*

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CIVIL PROCEDURE: *Pleadings - Striking out amended writ and statement of claim - Derivative action by minority shareholders - Whether pleadings disclosed any cause of action - Whether claim clearly unsustainable - Rules of the High Court 1980, O. 18 r. 19(1)*

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This was an appeal by the plaintiffs against the decision of the deputy registrar allowing the application by the 2nd and 3rd defendants ('defendants') pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 to strike out the plaintiffs' amended writ and statement of claim ('ASOC') in respect of a derivative action

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initiated by the plaintiffs, on the ground that the pleadings disclosed no cause of action. The plaintiffs submitted that they collectively owned 33.5% of the 1st defendant "quasi-partnership" company and were, therefore, the minority shareholders whereas the defendants were the majority shareholders, and that their

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action fell within the ambit of the exception to the rule in *Foss v. Harbottle*. In opposing the defendants' application, the plaintiff had raised the following issues: (i) fraud, oppression of the minority, breach of trusts, common intention and constructive trusts by the defendants and the majority shareholders; (ii) the 1st defendant

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was a quasi-partnership company; (iii) whether there was a trust, settlement, legacy or partnership; (iv) breach of fiduciary duties by the directors of the company; and (v) the justice of the case. It also fell to this court to determine whether the plaintiffs had the *locus standi* to bring this action.

I

Held (dismissing the appeal):

- (1) The ASOC purported to be a derivative action but it lacked all the ingredients of one. There was nothing in the ASOC to show that the plaintiffs had been prevented by the majority from suing or that the majority had refused to sue, and there was also no statement that the action was brought for the benefit of the company. (paras 33, 37 & 38)
- (2) As pleaded by the plaintiff, the defendants were the majority shareholders of the 1st defendant and on the pleadings, there was no fraud on the minority on the part of the majority within the meaning of *Foss v. Harbottle*. There is no such thing in company law as a common intention trust amongst the directors and the members of a company. A company is a separate legal entity that is separate from its members; it owns its own assets and not any of its directors'. (paras 49 & 50)
- (3) As regards issue (ii), the action was a common law action *ie*, by way of a writ. At common law, there is no such thing as a quasi-partnership. A company is either a company or it is not. On the facts, none of the matters stated in paras. 1 to 6 of the ASOC made the 1st defendant a quasi-partnership. (paras 54 & 57)
- (4) There was also no existence of a trust for the beneficiaries of the company which included the plaintiffs and the defendants. *Ponniah v. Sivalingam & Ors* (dist). (para 59)
- (5) Issue (iv) related to the conduct of the directors of the 1st defendant, and taking the plaintiffs' case to its highest, these were wrongs committed against the 1st defendant. The 1st defendant was the proper plaintiff; the plaintiffs, being shareholders of the 1st defendant, suffered reflective losses. (paras 60 & 61)
- (6) Regarding issue (v), no facts had been pleaded to justify the application of such an exception to the rule in *Foss v. Harbottle*. In truth, the plaintiffs sought to wind up the company and ask for the return of the share capital by way of distribution of assets as stated in the ASOC. It was a winding up petition in the guise of a writ action. Apart from the fact that this was not a winding up petition, the creditors would be unduly prejudiced. (paras 63 & 64)

- A (7) Upon perusal of the ASOC, there was no evidence of wrongdoings or breach of fiduciary duty nor had it disclosed any cause of action against the defendants. The plaintiffs' claim was, thus, clearly unsustainable. (paras 65 & 66)

B Case(s) referred to:

Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors [1995] 4 CLJ 551 CA (**refd**)

Alor Janggis Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC (**refd**)

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC (**refd**)

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Burland v. Earle [1902] AC 83 (**refd**)

Ebrahimi v. Westbourne Galleries Ltd [1973] AC 360 (**refd**)

Edwards v. Halliwell [1950] 2 All ER 1064 (**refd**)

Foss v. Harbottle [1843] 2 Hare 461, 67 ER 189 (**refd**)

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Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC (**refd**)

Hill v. Permanent Trustee Co of New South Wales Ltd [1930] AC 720 (**refd**)

Johnson v. Gore Wood & Co (a firm) [2001] 1 BCLC 313 (**refd**)

Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2) [1982] Ch 204 (**refd**)

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S Manickam & Ors v. Ismail Mohamed & Ors [1996] 1 LNS 117 (**refd**)

S Ponniah Sinniah v. Sivalingam S Ponniah & Ors [1991] 2 CLJ 1602; [1991] 3 CLJ (Rep) 468 HC (**dist**)

Salomon v. A Salomon & Co Ltd [1897] AC 22 (**refd**)

Warisan TC Holdings Berhad & Anor v. Tan Boon Pun & Ors And Another Case [2004] 1 LNS 334 (**refd**)

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Zakaria Mohamed Esa v. Dato' Abdul Aziz Ahmad & Ors [1984] 1 LNS 92 (**refd**)

Legislation referred to:

Companies Act 1965, ss. 64, 181, 218(1)

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Rules of the High Court 1980, O. 12 r. 6(1), O. 18 r. 19(1)(a)

For the plaintiffs - M/s Darshan Singh & Co

For the defendants - M/s Chan Leong & Co

Reported by Suresh Nathan

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JUDGMENT

Mohd Sofian Abd Razak J:

- I [1] The plaintiffs in this case filed a writ of summons and statement of claim on 19 April 2005 and later an amended writ of summons and amended statement of claim dated 20 June 2005

(ASOC) and served on the defendants on 18 August 2005. The learned counsel for the defendants then filed an *ex parte* summons in chambers (encl. 4) dated 24 August 2005 for leave to file a Memorandum of Conditional Appearance within seven days from the date of the order. Enclosure 4 was fixed and heard on 24 August 2005 and the court allowed the leave application by the defendants whereupon the defendants filed a Memorandum of Conditional Appearance dated 24 August 2005 (encl. 7).

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[2] Enclosure 8 is an application by the 2nd and 3rd defendants (hereinafter called the defendants') pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 (RHC) 1980, whereby the defendants seek to strike out the plaintiffs' writ and amended statement of claim dated 24 July 2005 on the grounds that the pleading discloses no cause of action.

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[3] The said application, encl. 8 was fixed for hearing on 23 November 2005 and the learned deputy registrar after perusing the written submissions filed by both parties, adjourned the matter for decision to 19 July 2006. The learned deputy registrar then allowed encl. 8 with costs. The plaintiffs who were dissatisfied with the said decision had filed a notice of appeal to judge in chambers on 24 July 2006 (enclosure 18).

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[4] Enclosure 18 was fixed for hearing on 19 September 2006 but was adjourned to another date pending the filing of written submissions by both parties.

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[5] For this purpose the parties had filed the written submissions before the learned deputy registrar and had intimated to the court that parties would like to adopt the said same submissions in the appeal to judge in chambers. The following documents were filed namely:

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(i) Defendants' written submission (encl. 11)

(ii) Plaintiffs' written submission (encl. 13)

(iii) Defendants' written submission (encl. 15)

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[6] On 13 May 2007, the court after perusing the written and hearing oral submissions by both parties dismissed encl. 18 with costs and hence this appeal.

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A [7] In opposing the defendant's application, the learned counsel for plaintiff raised five issues namely as follows:

- B i) Fraud, oppression of minority, breach of trusts, family and friends settlement, legacy, partnership, common intention, constructive trust by the 2nd and 3rd defendants and the majority shareholders.
- ii) The 1st defendant company being a 'quasi-partnership' company.
- C iii) Whether there is a trust, settlement, legacy or partnership.
- iv) Breach of fiduciary duties/conflicts of interest.
- v) Justice of the case.

D The Plaintiffs' Submission

E [8] In its submission, the learned counsel for plaintiffs submitted that the plaintiffs collectively owns 33.5% of the 1st defendant quasi-partnership company. Henceforth the plaintiffs were at all material times merely minority shareholders whereas the 2nd and 3rd defendants through their respective family company and/or family members and/or by themselves are the majority shareholders of the 1st defendant at all material times.

F [9] It is perhaps pertinent at this juncture to reproduce para 4 of the amended statement of claim (hereinafter called ASOC) for easier reference:

- G 4. Hampir semua pemegang-pemegang saham samada Plaintiff-Plaintif sebagai individu atau entiti syarikat, Plaintiff-Plaintif dan Defendan Kedua serta Defendan Ketiga adalah waris-warlis pengasas-pengasas di mana butir-butir adalah seperti berikut:

	Nama>Nama Syarikat	Jumlah Saham	Peratusan
H	HLB Nominess (Tempatan) Sdn. Bhd.	1943151	21.12%
	Teoh Boon Beng @ Teoh Eng Kuan	557576	6.06%
I	Lim Siak Yu Sdn. Bhd.	920000	10.00%
	Teoh Boon Teong	167273	1.82%

Leong Kok Cheng Corporation Sdn. Bhd.	920000	10.00%	A
Korlim Holding Sdn. Bhd.	920000	10.00%	
Lim Peak Suan Sendirian Berhad	920000	10.00%	B
Lim Piak Chiang Holdings Sdn. Bhd.	920000	10.00%	
Lim Song Hooi	322000	3.50%	C
Lim Song Beng	322000	3.50%	
Leong Lim Yang Hee @ Lim Yang Hee	276000	3.00%	
Leong Lim Meng @ Lim Yang Meng	276000	3.00%	D
Lim Hun Tong @ Lim Yang To	276000	3.00%	
Toh Whui Limited	460000	5.00%	E

[10] The plaintiffs' counsel argued that the plaintiffs as minority shareholders of the 1st defendant in this proceeding it must necessary falls within the exception to the rule in *Foss v. Harbottle* [1843] 2 Hare 461, 67 ER 189, (following the judgment of Jenkin LJ in *Edwards v. Halliwell* [1950] 2 All ER 1064 at p. 1066. The above principle, according to the plaintiffs' counsel had been approved and adopted by the Court of Appeal in the *Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors* [1995] 4 CLJ 551 to include (i) *ultra vires* acts, (ii) fraud on the minority (iii) special majority (iv) personal rights (v) where justice of the case requires. It was the submission of the plaintiffs that the case fall within the exception in (b) (c) and (e) and thus the action by the plaintiffs' falls within the ambit of the exception to the rule in *Foss v. Harbottle (supra)*.

[11] The learned counsel for the plaintiffs further submitted that para 8 of the ASOC described how fraud, oppression of minority, breach of trusts, family and friends settlement, legacy partnership, common intention, constructive trust by the 2nd and 3rd defendants and the majority shareholders were perpetrated by the 2nd and 3rd defendant on the plaintiffs.

- A [12] It can be seen from para 5 of the ASOC, that the gist of the plaintiffs' claim is premised on the existence of a trust. This is the second issue that was raised by the plaintiffs in its submission. In prayer (i) and (ii) the plaintiffs are asking the court to declare that the 1st defendant which was established as a quasi-
- B partnership company is a trust, settlement, legacy and business partnership whereby it is for the positive and reasonable enjoyment, benefits etc, of all matters of the company be it the plaintiffs or the defendants as beneficiaries of the founders of the company. The plaintiffs referred to the case of *S Ponniah Sinniah*
- C *v. Sivalingam S Ponniah & Ors* [1991] 2 CLJ 1602; [1991] 3 CLJ (Rep) 468, where the plaintiff seeks various orders and declarations on the grounds that the shares which were allotted to D1 to D8 were to be held on trust for him and that D1 to D7 were estopped in law and in fact from denying the existence of the trust.
- D [13] The issue for the court in *Ponniah v. Sivalingam (supra)* was whether D1 to D7 held the shares in D9 which were allotted to them by P, in trust for P or whether such allotments were an advancement.
- E [14] The court in the said case held that the first company was incorporated in order to ensure that his wife would be looked after in the same manner and life style she was accustomed to and ensure that the 7th defendant would be properly married off and the younger children properly educated. As such, the allotment was purely on trust with certain intentions.
- F [15] The learned counsel for the plaintiffs submitted that applying the same principle as laid down in *Ponniah v. Sivalingam's* case to the instant case had urged the court to make an order for a declaration that there existed a trust for the beneficiaries of the company which included the plaintiffs and the defendants.
- G [16] On the issue of *locus standi*, the learned counsel for the plaintiffs submitted that the plaintiffs as minority shareholders of the company holding 33.5% of the total shares of the 1st defendant have a *locus standi* to initiate this proceeding against the 2nd and 3rd defendants who represented the majority shareholders and are in control of the 1st defendant. Reference was made to the case of *Alor Jangus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn. Bhd. & Ors* [1995] 1 CLJ 461.
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[17] The other issue raised by the plaintiffs in its submission for the court's determination is whether there is a breach of fiduciary duties/conflict of interest by the 2nd defendant. A

[18] The learned counsel for the plaintiff submitted that the 2nd defendant is in breach of fiduciary duties on the basis that he was managing director and has personal interests in companies such as Wira Sawit Sdn Bhd, Agrocom Enterprise Sdn Bhd and /or Agrocom Palmcone Sdn Bhd. B

[19] It was further submitted that from the pleadings, it is obviously clear that there is in existence the elements of breach of fiduciary duty and conflict of interests by the 2nd defendant (see the case of *Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors (supra)*). C

The Defendants Submission D

[20] In the brief written submissions by the learned counsel for the 2nd and 3rd defendants, it was submitted as follows namely:

- i) that the plaintiffs have failed to show that the company was entitled to the relief sought. E
- ii) that the action by the plaintiffs do not fall within the proper boundaries of the exceptions to the rule in *Foss v. Harbottle (supra)*. F
- iii) that if the allegation of wrongdoings were done against the company, then the proper plaintiff is the company being the injured party. G
- iv) that by bringing the said action within the fraud exception rule, the plaintiff must show that the wrongdoers must constitute the majority of the company. The 2nd and 3rd defendants have denied that they collectively are majority shareholders in the 1st defendant's company. H
- v) that the 1st defendant as a company is purely a creature of statute and acquired legal personality as a result of the act of incorporation which is a separate legal entity. I
- vi) once a company is incorporated by statute, motives are irrelevant.

- A vii) in terms of corporate personality, the company owns its property and not its shareholders.
- viii) in a derivative action, a company is a nominal defendant and also beneficiary of the remedies and cannot seek remedies
- B against the company.

Findings Of The Court

- C [21] Before the court decide on the merits of the case, it is perhaps pertinent to note that at the outset upon being served with the ASOC, the 2nd and 3rd defendants have entered a memorandum of conditional appearance on 24 August 2005 pursuant to O. 12 r. 6 of the Rules of the High Court (herein after called the 'RHC 1980').

- D [22] Under O. 12 r. 6(1) RHC 1980, a defendant to an action with the leave of the court enter a conditional appearance in Form 16 in the action. The purpose of this rule is to prevent a judgment in default being entered against him and at the same time the defendant remains entitled to object to any irregularity in
- E the issue of service of the writ or to the court's jurisdiction to deal with the dispute.

- F [23] According to the Malaysian High Court Practice 2003 Desk Edition by Malayan Law Journal, the term 'conditional appearance' means an appearance in qualified terms, reserving to the appearing defendant the right to apply to the court to set aside the writ or service thereof for an alleged informality or irregularity which renders either the writ or service invalid. The defendant must apply to the court to enforce his alleged objection failing which
- G the appearance shall stand as unconditional and the action proceed accordingly.

- H [24] The 2nd and 3rd defendants have on 24 August 2005 filed an *ex parte* summons in chambers (encl. 4) pursuant to O. 12 r. 6(1) of the RHC 1980 for the following reliefs namely:

- (i) that the defendants be given leave to enter a conditional appearance within seven days from the date of the said order.
- (ii) that the defendants within 14 days after leave was granted to enter a conditional appearance, file an application to set aside and/or strike out the amended writ and statement of claim.
- I (iii) costs in the cause.

[25] The ground for the said application for leave is that the plaintiffs have no *locus standi* and no reasonable cause of action against the defendants. The defendants' application (encl. 4) for leave was granted by the learned deputy registrar on 24 August 2005.

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[26] Pursuant to the leave granted the learned counsel for the 2nd and 3rd defendants filed an application (encl. 8) to strike out the plaintiffs' amended writ and statement of claim.

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[27] The learned deputy registrar allowed the 2nd and 3rd defendants application to strike out the amended writ and statement of claim on 19 July 2006. The learned counsel for the plaintiffs then filed an appeal to judge in chambers (encl. 18) on 24 July 2006. The court heard the appeal and dismissed it with costs.

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[28] The 2nd and 3rd defendants' application to strike out the plaintiffs' amended writ and the statement of claim is premised on O. 18 r. 19(1)(a) of the RHC 1980 where it discloses no reasonable cause of action.

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[29] In *Gasing Heights Sdn Bhd v. Aloyah bte Abd Rahman* [1996] 3 CLJ 695 Mahadev Shanker J stated that the court in determining whether the statement of claim discloses a reasonable cause of action, the state of affairs to which the court must have regard is that which prevailed at the date of the action is filed which has to be determined by the pleadings itself. No affidavit evidence is admissible (see *S. Manickam & Ors v. Ismail bin Mohamed & Ors* [1996] 1 LNS 117, *Zakaria bin Mohamed Esa v. Dato' Abdul Aziz bin Ahmad & Ors* [1984] 1 LNS 92).

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[30] One of the issues which the court has to determine from the pleadings is whether the plaintiffs have the *locus standi* to bring this action. From the ASOC is quite clear that in para 8 thereof, the plaintiffs' averred that there was fraud, oppression of minority, breach of trusts, family and friends settlement, legacy partnership, common intention constructive trust by the 2nd and 3rd defendants who were the majority shareholders and perpetrated by the 2nd and 3rd defendants respectively on the company.

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A [31] In this regard the court is agreeable with the submissions of the learned counsel for the 2nd and 3rd defendants in that where the alleged wrongs are done against a company, the proper plaintiff is the company. This is because the company is the injured party.

B [32] However, there are situations where the majority or those in control of the company refuses to sue in the name of the company to recover the alleged losses suffered by the company. In such cases, the law provides an exception to the proper plaintiff principle. The minority shareholder can institute an action for and on behalf of the company. The substantive prerequisites are:

- D – the writ of summons must carry an endorsement or title to the action to the effect the plaintiff as minority share-holder brings this action on behalf of themselves and the other shareholders (except the defendants who are the majority shareholders);
- E – the statement of claim must contain a statement to the effect that the action is for the benefit of the company and particularise facts to show that by reason of the defendants' opposition to sue in the name of the company, it is bringing this action for and on behalf of the company;
- F – the beneficiary of the remedy must be the company itself because it is the injured party.

[33] The ASOC purports to be a derivative action but it lacks all the ingredients of a derivative action.

G [34] The Court of Appeal in *Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors (supra)* at p 560 said:

H The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleadings filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

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[35] Later at p 562 the Court of Appeal also said:

In our judgment, the derivative action has not reached a stage where a plaintiff may disregard its procedural elements. We emphasize that it is not permissible for a plaintiff in a derivative action to sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company of which he is a shareholder ...

[36] The action and the ASOC lack the ingredients set out below.

- The title to the action does not reflect that it is brought in a representative capacity ie, the action is brought by the plaintiffs for themselves and for and on behalf of the other shareholders (except the defendants who are the majority shareholders). This offends the first limb in the passage in *Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors (supra)*;
- The ASOC does not disclose that it is a derivative action nor does it recite the facts that make it so, namely, that the plaintiffs had been prevented by the majority of the company from suing. This offends the second limb in the passage in *Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors (supra)*;
- The ASOC does not contain any averment that the action is brought for the benefit of the company. This offends the third limb in the passage in *Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors (supra)*.

[37] There is nothing in the ASOC to show that the plaintiffs had been prevented by the majority from suing or that the majority had refused to sue.

[38] There is also no statement that the action is brought for the benefit of the company, if one looks at the prayers, in particular the remedies in prayer (i), (ii), (viii), (ix) (x), (xi), (xii), (xv) and (xvi), these prayers are for the benefit of the plaintiffs, not the 1st defendant.

[39] In *Warisan TC Holdings Berhad & Anor v. Tan Boon Pun* [2004] 1 LNS 334, Abdul Wahab Said JC (as he then was) said:

- A It would appear pertinent that in the pleadings there is no express statement in the pleadings that the action is being brought for the benefit of the company. I agree with the Defendants in counterclaim this is a procedural requirement of derivative action which the Plaintiff had failed to comply. For this reason also I
- B agree that the counterclaim is frivolous and vexatious.
- C [40] As a matter of fact, the 2nd and 3rd defendants (Leong Kok Heng @ Leong Kok Cheng and Teoh Boon Teong) only have 11.82% in the 1st defendant. This is admitted to in para 4 of ASOC. The 2nd defendant was at all material times a director and having an indirect interest through share ownership in his family company named Leong Kok Cheng Corporation Sdn Bhd.
- D [41] In *Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors (supra)*, the Court of Appeal quoted *Burland v. Earle* [1902] AC 83 at p 93:
- E ... Again, it is clear law that in order to redress a wrong done to a company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle* and *Mozley v. Alston*, and in numerous later case which it is unnecessary to cite. But an exception is made to the second rule, where the person against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an
- F action to be brought in the name of the company ... (emphasis added).
- G [42] In *Alor Janggus Soon Seng Trading Sdn Bhd (supra)*, the passage cited above in *Burland v. Earle* was expressly referred to at p 560.
- H [43] In *Warisan TC Holdings Bhd & Anor v. Tan Boon Pun (supra)*, the plaintiff in the counterclaim in that case had not pleaded that he had invoked company procedure to sue before filing the derivative action. In striking the action, Wahab Said JC (as he then was) said:
- I TBP however has not shown that he could bring himself within the exception to the rule in *Foss v. Harbottle (supra)*. He has not taken any steps to invoke the company procedures before taking this derivative action. He has not by resolution or otherwise approach the board of the company should sue the Defendants. He had not attempted to call for any EGM to ascertain the wishes of shareholders as to whether the company should commence action against Defendants.

In his counterclaim TBP has pleaded why he considers he is in no position to compel the company to commence the action. He said he could not by reason of the majority opposition, obtain the consent of the company to initiate proceedings against the directors of the company. As a minority shareholder of Warisan, Plaintiff could not question the acts of the Defendants because the majority of the shareholders are in favour of the defendants action. Plaintiff's right to question no longer exists.

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I am satisfied the Plaintiff had failed to establish the prerequisite of a derivative action. It is therefore premature and an abuse of process by the Plaintiff to file the derivative action. The procedural requirement to fall within the exception of the rule in *Foss v. Harbottle* had not been made out and accordingly TBP has no *locus standi* to bring the derivative action on behalf of the company.

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[44] It is accepted that a shareholder can bring a personal action. However, the ASOC does not say that this is a personal action. In any event, on the pleadings there cannot be a personal action. In a personal action, it is an action complaining that the personal and individual rights of the shareholder and not the company's rights have been violated. An example of a personal action is the case of *Edwards v. Halliwell (supra)*. At p 1067, Jenkins LJ said:

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In my judgment, this is a case of a kind which is not even within the general ambit of the rule. It is not a case where what is complained of is a wrong done to the union, a matter in respect of which the cause of action would primarily and properly belong to the union. It is a case in which certain members of a trade union complain that the union, acting through the delegate meeting and the executive council in breach of the rules by which the union and every member of the union are bound, has invaded the individual rights of the complainant members, who are entitled to maintain themselves in full membership with all the rights and privileges appertaining to that status so long as they pay contributions in accordance with the table of contributions as they stood before the purported alteration of 1943, unless and until the scale of contributions is validly altered by the prescribed majority obtained on a ballot vote. Those rights, these members claim, have been invaded. The gist of the case is that the personal and individual rights of the membership of each of them have been invaded by a purported, but invalid, alteration of the tables of contributions. In those circumstances, it seems to me the rule in

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- A *Foss v. Harbottle* has no application at all, for the individual members who are suing sue, not in the rights of the union, but in their own right to protect from invasion their own individual rights as members.
- B [45] In substance, the plaintiffs claimed that they have personally suffered losses in the manner as stated in paras 8 and 9 of ASOC. Hence, the prayer 20(i), a declaration that the company is a trust, legacy, partnership or constructive trust for all shareholders and that in prayer 20(ii), all shareholders are constructive trustees of the assets of the company. This is totally
- C against the principle of *Salomon v. A. Salomon & Co. Ltd* [1897] AC 22 and the principle of separate corporate personality.
- [46] Apart from the above principle, is the reflective loss principle. This principle simply means that if the company has suffered losses
- D because of loss of value of shareholding or dividend, the shareholders cannot sue.
- [47] In *Prudential Assurance Co Ltd v. Newman Industries Ltd (No. 2)* [1982] Ch 204, the English Court of Appeal at p 222 said:
- E But what (a shareholder) cannot do is to recover damages merely because the company in which he is interested has suffered damages. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the losses
- F suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company ...
- Then at p 224, it was said:
- G A personal action would subvert the rule in *Foss v. Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder
- H has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder.
- [48] As to the five issues raised by the learned counsel for the plaintiffs in the affidavit in opposition to the defendants' application
- I to strike out, the court shall deal with them *in seriatim*.

First Issue

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[49] As pleaded by the plaintiffs, the 2nd and 3rd defendants are the majority shareholders in the 1st defendant. On the pleadings, there is no fraud on the minority on the part of the majority within the meaning of *Foss v. Harbottle*. Who are the majority and where are the majority in the pleading?

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[50] The court agrees with the view that there is no such thing in company law as a common intention trust amongst directors and members of a company. A company is separate legal entity that is separate from its members. A company owns its own assets and not any of its directors. The entire gist of the ASOC is that there is a trust. It is impossible in law for this Honourable Court to grant the primary relief as contained in prayer (i) and (ii) of the ASOC.

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[51] In *Johnson v. Gore Wood & Co (a firm)* [2001] 1 BCLC 313, Lord Millett at p. 365 said:

... Where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder ... the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or then loss of dividend, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditor and other shareholders. Neither course can be permitted. This is a matter of principle, there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other, protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.

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[52] The true relief that is asked by the plaintiffs is in prayers (xv) and (xvi) namely that the assets of the company be sold and the proceeds be distributed to shareholders according to their shareholdings.

H

[53] The above is impossible in law. It tantamounts to an unlawful return or reduction of share capital to share-holders. This can never be done except in a winding up or through the reduction of capital provision in s. 64 of the Companies Act 1965

I

A ('the Act'). The law reports are riddled with cases on this point. It is sufficient to cite the case of *Hill v. Permanent Trustee Co of New South Wales Ltd* [1930] AC 720. At p 731, it was said:

B A limited company not in liquidation can make no payment by way of return of its capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with monies to its shareholders must and can only be made by way of dividing profits. Whether the payment is called dividend or bonus, or any other name, it still must remain a payment on division of profits.

C
Second Issue

[54] The action is a common law action ie, by way of a writ. At common law, there is no such thing as a quasi-partnership. Either
D a company is a company or it is not.

[55] The articles of association of a company represent the common law of the company and are exhaustive of the relationship between the parties. There is no jurisdiction at common law to categorise a company as a quasi-partnership. The
E jurisdiction only exists in statute to treat inappropriate cases when properly pleaded as a quasi-partnership company, either under s. 218(1) of the Act under the just and equitable provision: *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360. In *Ebrahimi*, it was said:

F To refer, as so many of the cases do, to "quasi-partnership" or "in substance partnership" may be convenient but may also be confusing. It may be convenient because it is the law of
G partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the word "just and equitable" sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to
H underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even
I a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.

[56] It is also possible under statute to treat in appropriate cases when properly pleaded as a quasi partnership company under s. 181 of the Act. A

[57] None of the matters stated in paras 1 to 6 of ASOC makes the 1st defendant a quasi-partnership. B

Third Issue

[58] Plaintiffs rely on the case of *Ponniah v. Sivalingam & Ors* (*supra*) to support their contention of the existence of a trust. C

[59] The brief facts of that case involve a transfer of shares from father and sons. The court in that case held that once the presumption of advancement was rebutted, the sons held the shares on trust for the father. This case has nothing to do with what the plaintiffs claimed. It was a case where shares in a company were found to be held on trust in private capacity between two individual members of the company. D

Fourth Issue

[60] These are allegations that relate to the conduct of directors. E

[61] Taking the plaintiffs' case to its highest, these are wrongs committed against the 1st defendant. The 1st defendant is the proper plaintiff. The plaintiffs being shareholders of 1st defendant suffer reflective losses. F

Fifth Issue

[62] The justice of the case exception to *Foss v. Harbottle* was doubted to exist in *Prudential Assurance Co Ltd v. Newman Industries Ltd* (*supra*) at p. 221 it was said: G

The second observation which we wish to make is merely a comment on Vinelott J's decision that there is an exception to the rule in *Foss v. Harbottle* whenever justice of the case so requires. We are not convinced that this is a practical test, particularly if it involves a full-dress trial before the test is applied ... In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a *prima facie* case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle*. On the latter issue it may well be right for the judge trying the preliminary issue to grant a sufficient H I

A adjournment to enable a meeting of shareholders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting.

[63] In any event no facts have been pleaded to justify the application of such an exception to the rule in *Foss v. Harbottle*.

B [64] In truth, the plaintiffs seek to wind up the company and ask for return of share capital by way of distribution of assets as stated in prayers (xv) and (xvi) of the ASOC. It is a winding up petition in the guise of a writ action. Apart from the fact that this is not a winding up petition, creditors will be unduly prejudiced.

Decision

D [65] Adopting the approach as stated by Mahadev Shanker J in *Gasing Height Sdn Bhd v. Aloyah bte Abd Rahman (supra)* and upon perusing the ASOC, the court finds that there is no evidence of wrongdoings or breach of fiduciary duty which has been pleaded or alleged nor has it disclosed any cause of action against the 2nd and 3rd defendants, respectively.

E [66] The law and principles applicable to striking out actions under O. 18 r. 19 RHC, 1980 are very clear and settled. The summary procedure should only be adopted when it is conspicuously clear that the claim on the face of its is obviously unsustainable. In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, the Supreme Court held:

G The principle upon which the Court acts in exercising its power under any of the four limbs of Order 18 r. 19(1) of the rules of the High Court 1980 are well settled. It is only plain and obvious cases that recourse should be had summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable.' It cannot be exercised by a minute examination of the documents and facts of the case in order to see, whether the party has a cause of action or a defence.

H [67] Bearing the above principles in mind and the reasons as adumbrated aforesaid, the court dismissed the plaintiffs' appeal (encl. 18) against the decision of the learned deputy registrar who had struck out the plaintiffs ASOC against the 2nd and 3rd defendants with costs.

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